

---

## FOR YOUR INFORMATION

---

April 2005  
News For School Clients

### **EEOC Rule for Retiree Coordinated Health Care Benefits Struck Down**

On April 22, 2004, the Equal Employment Opportunities Commission (EEOC) approved a rule that would have allowed employers to offer retiree health benefit plans, which were coordinated with Medicare eligibility, without violating the Age Discrimination in Employment Act (ADEA), even if that coordination did not satisfy the equal benefit or equal cost defense provided for in the ADEA. The rule was to take effect upon publication in the Federal Register.

The EEOC formulated this “coordination rule” after the EEOC learned, through its enforcement of the decision in *Erie County Retirees Association v. County of Erie*, 220 F.3d 193 (3<sup>rd</sup> Cir. 2000), that the *Erie County* holding was having the unintended consequence of discouraging employers from providing any retiree health benefits (which employers are not required by law to provide), so as not to run afoul of the ADEA’s nondiscrimination provisions.

The *Erie County* case involved litigation of the provisions of the health benefits plan offered by the County of Erie, Pennsylvania, to its employees. Under the Erie plan, the health coverage options for retirees were allegedly reduced once the retirees became Medicare eligible. The Third Circuit Court of Appeals held in *Erie County* that it was clear that Congress intended for the ADEA’s prohibitions against age discrimination to apply to the practice of reducing retiree health benefits when retirees become eligible for Medicare. Accordingly, the Third Circuit concluded that Erie County’s policy violated the ADEA unless Erie County met the “equal benefit or equal cost” defense set forth in the ADEA. The *Erie County* decision led to the EEOC’s development of the “coordination rule.”

On February 4, 2005, the American Association of Retired Persons (AARP) filed suit in the United States District Court for the Eastern District of Pennsylvania challenging the EEOC approved exemption, that is, its “coordination rule.” In *AARP v. EEOC*, Case No. 05-CV-509 (E.D. Pa. 2005), the AARP argued that the challenged exemption was contrary to the plain language of the ADEA.

In defending its rule, the EEOC conceded that the challenged rule would exempt from the ADEA the “coordination of retiree health benefits with Medicare or a comparable State health benefit,” thus allowing employers to engage in the same behavior prohibited by the *Erie County* decision. The EEOC in effect conceded that in *Erie County* the Third Circuit Court of Appeals held that Congress intended the ADEA to apply to the exact same behavior that the EEOC’s “coordination rule” would have permitted.

In a decision issued on March 30, 2005, in *AARP v. EEOC*, the district court granted the AARP’s motion for summary judgment and permanently enjoined the EEOC from publishing its “coordination rule.” The court found that the EEOC’s challenged exemption “is contrary to congressional intent and the plain language of the ADEA.”

Unless the district court’s decision in *AARP v. EEOC* is appealed and reversed, or unless Congress amends the ADEA and incorporates the EEOC exemption into the statute, the EEOC’s attempt to allow employers to provide retirement health insurance benefits to retired employees until they become eligible for Medicare may prove to be short-lived. What the EEOC hoped to prevent by publishing of the exemption may now come to

fruition, i.e., that employers will reduce or eliminate health benefits for all retirees, no matter what their age, because retiree health benefits are becoming so expensive employers cannot afford to give the same level of health benefits to all of their retirees. The intended effect of the EEOC's coordination rule was that employers would have been better able to afford to offer greater health benefits to their retirees under age 65, who, when they become eligible for Medicare, are in less need of employer provided health benefits. It is worth noting that representatives from labor unions, the health insurance industry, and employer groups filed friend-of-the-court briefs in support of the EEOC's exemption, but to no avail.

A representative of the Milwaukee office of the EEOC expressed the opinion that the district court's decision in *AARP v. EEOC* will "most likely" be appealed. The EEOC representative also stated that the Milwaukee EEOC office has no plans at the present time to make any changes in its current enforcement plan, which is to refrain from pursuing ADEA claims against employers that provide retirement health insurance until Medicare eligibility. The Milwaukee EEOC office may continue to adhere to its current enforcement plan primarily because the district court decision in *AARP v. EEOC* is not an appellate decision and is not from a court in the Seventh Circuit, which encompasses Wisconsin, Illinois and Indiana.

While waiting for the scenario to play out, school districts would be well advised to take a cautious approach by *insisting upon the inclusion of ADEA waivers* as part of any agreement or policy that provides early retirement benefits for employees that are altered, reduced or eliminated when the participant becomes eligible for Medicare. An alternative approach is to eliminate any reference to Medicare eligibility in the provision for retiree health benefits; however, because the retiree health

benefits would not cease when the retiree became eligible for Medicare, school districts should be fully cognizant of the potential for increased costs associated with such an approach.

Since most early retirement plans are negotiated between the school district and a labor organization representing a group of the district's employees, generally, the school district may not unilaterally modify the early retirement plan. Rather, the school district would be forced to negotiate any changes to the early retirement plan. However, many collective bargaining agreements include a savings clause, such as,

If any section of this agreement should be held invalid by operation of law or by any tribunal of competent jurisdiction, the remainder of this agreement and addendum thereto shall not be affected thereby, and the parties shall enter into immediate negotiation for the purpose of attempting to arrive at a mutually satisfactory replacement for such section.

By invoking such a savings clause, it may be possible for the school district to force the labor organization to bargain a new early retirement plan to replace a plan that provides employees with retirement health insurance until Medicare eligibility.

Not all early retirement plans include a bridge to Medicare. For example, some early retirement plans provide retirement health insurance for a particular number of years. Where a school district has an early retirement plan that does not provide employees with retirement health insurance until Medicare eligibility, the court's decision in *AARP v. EEOC* will not affect the early retirement plan at all.

*If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.*

Michael J. Julka	(608) 286-7238	Frank C. Sutherland	(608) 286-7243
Ronald J. Kotnik	(608) 286-7214	Joanne Harmon Curry	(608) 286-7248
David E. Rohrer	(608) 286-7249	Shana R. Lewis	(608) 286-7202
Michael J. Lawton	(608) 286-7236	Richard F. Verstegen	(608) 286-7233

*Disclaimer:* Lathrop & Clark LLP provides this material for information about legal issues and not to give legal advice, which may quickly become outdated. Anyone using this material must update the information presented to ensure accuracy. The use of the materials does not establish an attorney-client relationship, and Lathrop & Clark LLP recommends the use of legal counsel on specific matters.